

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTORIA YVETTE JONES,

Defendant-Appellant.

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UNPUBLISHED

March 9, 2006

No. 261414

Wayne Circuit Court

LC No. 03-013143-01

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals by right from her conviction of probation violation and her sentence of nine months to five years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court found defendant guilty of carrying a concealed weapon (CCW), MCL 750.227(2), and sentenced her to serve a term of two years' probation. As conditions of her probation, defendant was prohibited from having contact with Pierre and Stacey Nelson, her neighbors, and was required to undergo a psychiatric evaluation.

Defendant was charged with violating her probation by having contact with the Nelsons. At a hearing, the Nelsons testified that they had encountered defendant in and around the building in which all three resided, and that defendant had filed a lawsuit against them. Stacey Nelson stated that on one occasion, defendant was holding a gun in her purse. Defendant acknowledged that she saw the Nelsons and a neighbor talking and that she bumped into the neighbor, but contended that she did so accidentally. She acknowledged that she walked behind the Nelsons at one point when the three of them were leaving the building, but denied she was carrying a gun in her purse at the time. She maintained that her probation officer told her she was allowed to file suit against the Nelsons. Defendant acknowledged that she had not yet obtained a psychiatric evaluation, but contended that she did not have sufficient funds to do so.

The trial court found that defendant had violated her probation by having contact with the Nelsons and remanded her to jail. The trial court subsequently released defendant on bond and

scheduled a bond hearing. Defendant did not appear for the hearing, and the trial court issued a warrant for her arrest. At an arraignment on the warrant, the trial court remanded defendant to jail.

The statutory sentencing guidelines recommended a minimum term range of zero to nine months for the underlying offense. The trial court found that defendant's violation of probation constituted a substantial and compelling reason for exceeding the guidelines and sentenced her to nine months to five years in prison for carrying a concealed weapon.<sup>1</sup>

Defendant moved for a new probation violation hearing, or in the alternative, for resentencing. The trial court denied the motion, noting that defendant's act of filing suit violated the condition of probation that she have no contact with the Nelsons, and declining her request to rescore the guidelines.

Defendant argues that the evidence was insufficient to support a finding that she violated her probation. She asserts that the evidence showed that she did not have notice of the bond hearing, that she did not have notice that she could not file suit against the Nelsons, and that any contact she had with the Nelsons was purely incidental and did not threaten them in any way. We disagree.

As a general rule, due process requires that a probationer be given prior notice of the conditions of the probation before probation can be revoked for failure to meet those conditions. *People v Stanley*, 207 Mich App 300, 307; 523 NW2d 892 (1994). Contrary to defendant's assertions, the trial court did not revoke her probation based on findings that she did not obtain a psychiatric evaluation or appear at the bond hearing. The trial court found defendant to be in violation of her probation prior to the occurrence of the bond hearing. Subsequently, at the sentencing hearing the trial court cited defendant's failure to obtain a psychiatric evaluation in a timely manner and her failure to appear at the hearing as grounds for the decision to revoke probation and sentence defendant to prison. The trial court based its finding that defendant violated her probation on the evidence that she continued to have contact with the Nelsons by filing a lawsuit and encountering them in and around their building, notwithstanding the fact that the terms of her probation prohibited any such contact. The trial court's finding that defendant violated the terms of her probation was supported by the preponderance of the evidence. MCR 6.445(E)(1); *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992).

Under the statutory sentencing guidelines, if the upper limit of the recommended minimum sentence range is eighteen months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to the jurisdiction of the Department of Corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or twelve

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<sup>1</sup> The Michigan Offender Tracking Information Service indicates that defendant was paroled on October 23, 2005.

months, whichever is less. MCL 769.34(4)(a). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). The trial court on the record must articulate the reason for the departure. MCL 769.34(3). A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. *Babcock*, *supra* at 259-260.

Defendant argues that she is entitled to be resentenced because the trial court did not articulate a substantial and compelling reason for exceeding the guidelines by imposing a prison term rather than an intermediate sanction. She asserts that Offense Variable (OV) 1, MCL 777.31, aggravated use of weapon, should have been scored at zero points rather than at 15 points because no evidence showed that she pointed a gun at anyone at the time she committed the underlying offense,<sup>2</sup> and that OV 9, MCL 777.39, number of victims, should have been scored at zero points rather than at ten points because no evidence showed that two to nine persons were victims of her offense. MCL 777.39(1)(d). Defendant asserts that had the guidelines been scored correctly, the recommended minimum term range would have been zero to three months.

Defendant's argument regarding the scoring of OV 1 and OV 9 has merit;<sup>3</sup> however, she has served the minimum term imposed by the trial court and has earned parole. Because we

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<sup>2</sup> At trial, the evidence showed that defendant was found with a pistol in her backpack as she stood on a sidewalk adjacent to the parking lot across the street from her complex. To support the scoring of OV 1 at 15 points, the evidence must show that the defendant pointed a weapon at the victim, or placed the victim in reasonable apprehension of receiving an immediate battery as a result of being threatened with a weapon. MCL 777.31(1)(b). In this case, no evidence showed that defendant pointed the gun at anyone at the time she committed the underlying offense, or that any victim had a reasonable apprehension of receiving an immediate battery as a result of being threatened by the gun.

<sup>3</sup> Offense variables are scored based on circumstances as they existed at the time the underlying offense was committed. The guidelines as originally scored apply to a sentence imposed following a conviction of probation violation. See *People v Hendrick*, 261 Mich App 673, 679; 683 NW2d 218 (2004), rev'd in part on other grounds 472 Mich 555 (2005). No evidence showed that at the time defendant committed the original offense, she pointed the gun at anyone or caused anyone to reasonably apprehend an immediate battery, or that anyone was victimized by the offense. Both OV 1 and OV 9 should have been scored at zero points. The scoring of OV 1 and OV 9 was not challenged at defendant's original sentencing.

cannot fashion a remedy, we conclude that this issue is moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).<sup>4</sup> Defendant is not entitled to resentencing.

We affirm.

/s/ Jessica R. Cooper  
/s/ Kathleen Jansen  
/s/ Jane E. Markey

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<sup>4</sup> Even if the guidelines had been properly scored, the trial court could have, and likely would have, concluded that defendant's violation of probation constituted a substantial and compelling reason to commit her to the Department of Corrections rather than impose an intermediate sanction. A defendant's conduct while on probation can constitute a substantial and compelling reason for exceeding the guidelines. *Hendrick, supra* at 562-563. Under these circumstances, defendant would have served a shorter term in prison, but would still be on parole at this time.